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Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

DEBRA JEAN SHEPHERD,
Petitioner,

v.

THE COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS,
Respondent

On Petition for a Writ of Certiorari
to the United State Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What are the respective roles of juries and judges in the determination of whether sexual harassment created a hostile or abusive work environment?

2. Did the court of appeals err in holding that sexual harassment is not actionable under Title VII unless it is both "severe *and* pervasive"?

3. Did the court of appeals err in holding that sexual harassment is not actionable under Title VII unless the harassment "destroys a protected classmember's opportunity to succeed in the workplace"?

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*The parties to this action are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Debra Jean Shepherd respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on March 16, 1999.

OPINIONS BELOW

The March 16, 1999, opinion of the court of appeals, which is reported at 168 F. 3d 871 (5th Cir. 1999), is set out at pp. 1a-7a of the Appendix. The January 27, 1998 order of the district court, which is not reported, is set out at p. 8a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on March 16, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

Section 703(a)(1) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part, "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."

STATEMENT OF THE CASE

Proceedings Below

On June 1, 1994, petitioner filed a Title VII charge with the EEOC, alleging that she had been repeatedly sexually harassed by a co-worker, and that her employer had failed to take corrective action despite several complaints. After a detailed investigation, the Commission issued a determination concluding that "[t]he evidence shows that Charging Party was subjected to sexual harassment and a tainted work atmosphere . . . . due to her sex, female. . . . Witness statements provided by her co-workers support Charging Party's allegations of sexual harassment."[1] Respondent, in reply to that determination, did not dispute the finding of sexual harassment, but argued only that it should not be held responsible for the harassment because the supervisor who failed to act on petitioner's complaints was a "low-level manager in a field

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[1]Determination, March 11, 1996, pp. 1-2.

office."[2]

On January 17, 1997, petitioner filed suit in Texas state court, alleging that the harassment violated Title VII of the 1964 Civil Rights Act. Respondent then removed the case to the United States District Court for the Southern District of Texas. Petitioner promptly filed a timely request for a jury trial. On January 27, 1998 the district judge entered an order granting respondent's motion for summary judgment. (App. 8a). That order was not accompanied by any memorandum or opinion explaining the basis of the district judge's decision.

On appeal respondent advanced two distinct arguments in support of the dismissal of the complaint, first, that the facts alleged by petitioner were not sufficient to create a hostile work environment, and second, that respondent could not be held liable for any such harassment because petitioner had complained about it only to lower level managers. On March 16, 1999, the court of appeals affirmed the award of summary judgment, reasoning that the asserted acts of harassment did not create a hostile work environment. (App. 4a-6a). The court of appeals did not reach the issue of whether the employer would have been legally responsible for any such harassment. (App. 6a-7a).

Statement of the Facts

Because the complaint in this case was dismissed as legally insufficient, at this juncture the factual allegations must be taken as true.

Petitioner is an employee of the office of the Texas Comptroller of Public Accounts, where she has held a variety of posts related to the imposition and collection of state taxes. She was subject to a campaign of sexual harassment by a co-worker, Jodie Moore, for a period of over a year, ending in December 1993. The original complaint alleged:

> Jodie Moore continuously touched various parts of Plaintiff's body and remarked that Plaintiff's

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[2]Response to Determination, May 3, 1996, p. 2.

> skin was soft and enticing. He continuo[u]sly asked the Plaintif[f] whether her skin was soft all over her body and remarked that whoever made love to the Plaintiff must certainly enjoy himself because of the pleasant feel of her skin.[3]

The complaint further alleged that on three different occasions petitioner had complained in vain to her supervisor or her manager about this ongoing harassment. On the first occasion, in July 1993, her supervisor, Fern Francis-Jackson, assured her that prompt and effective remedial steps would be taken; in fact, however, no action was taken. On the second occasion, in November, 1993, petitioner complained to both that supervisor and her manager; the manager, Grundy Wiley, responded that the harassment was benign, and the Mr. Moore "simply liked her." In January 1994 petitioner complained to the supervisor and manager again; Mr. Wiley responded that the touching about which she was complaining did not constitute sexual harassment.[4]

Four days after Wiley again spurned her complaint, the long pattern of harassment caused petitioner to have a nervous breakdown. She was admitted to the Southwest Memorial Hospital's Psychiatric Ward, where she remained for a week. Petitioner was then placed on a medical leave of absence, and did not return to work until June 20, 1994.

Only after petitioner's hospitalization did the employer take remedial action. Because of their mishandling of petitioner's complaints, Francis-Jackson was demoted, and Wiley was dismissed. No action was apparently taken against Moore, who by then had at his own initiative transferred to a different unit than that in which petitioner worked.

At her deposition petitioner provided a more detailed description of the harassment, which included offensive

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[3]Plaintiff's Original Petition, pp. 2-3.

[4]Plaintiff's Original Petition, pp. 3-4.

remarks, repeated efforts to look down petitioner's dress or blouse, and unwanted touchings.

On one occasion Moore remarked to petitioner, "[I] bet . . . your elbows are the same color as your nipples." (Shepherd Deposition, P. 80). Another time Moore commented, "wow, you have big thighs", and he "simulate[d] like looking underneath my dress." (*Id.* at 82). Several times Moore patted his lap and remarked to petitioner, "here's your seat." (*Id.* at 94-95). Moore also remarked that petitioner's then fiance "had a good time" with her in bed. (*Id.* at 196-97).

On more than a dozen occasions Moore would "stand over my desk and leer to look down my clothes", while laughing. (*Id.* at 84). When counsel for respondent demanded to know exactly how many times this had occurred, petitioner, in addition to putting the number between one and two dozen, responded, "it was enough to make me uncomfortable. So if it was one time, that was one time too many." (*Id.* at 85). Moore's offensive remark about the color of petitioner's nipples was presumably related to these repeated efforts to look at her breasts. Often when Moore did this, petitioner in vain shouted at him "stop, leave me alone, don't say that, don't do that." (*Id.* at 86). At times Moore deliberately choose to do this when petitioner was on the telephone with a taxpayer; unable to shout at him, petitioner "just grabbed my clothes." (*Id.*. at 87).

Moore also repeatedly touched petitioner in ways she found objectionable. On as many as ten occasions he stroked petitioner's arm from "my shoulders to my wrists", laughing and exclaiming "Oooh, you have soft skin." (*Id.* at 88, 91) Whenever Moore did so, petitioner objected "stop, don't do that"; Moore would then desist, but resume the practice later on. (*Id.* at 92). After counsel for respondent had asked six different questions about the number of times when this occurred, petitioner retorted, "He touched me, and I didn't give him permission to touch me. Okay?." (*Id.* at 90). Petitioner also objected that Moore had pinched or rubbed her cheek. (*Id.* at 176-79).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO DELINEATE THE RESPECTIVE ROLES OF JURIES AND JUDGES IN DETERMINING WHETHER SEXUAL HARASSMENT CREATED AN OBJECTIVELY HOSTILE OR ABUSIVE ENVIRONMENT

(a) This case presents the recurring issue of what the respective roles of judges and juries should be in the determination of whether incidents of sexual harassment created a hostile or abusive work environment. The past opinions of this Court have repeatedly assumed that juries have a role in that determination, but have not spelled out what that role should be. In the absence of clarification by this Court, several circuits treat this issue as a question of law to be decided by appellate judges; other circuits insist this is a jury issue. This problem is an instance of the broader and largely unresolved dispute about the respective roles of judges and juries regarding mixed questions of fact and law. Uncertainty about the role of judges and juries in resolving sexual harassment claims is of palpable practical importance, because hostile work environment claims constitute a large proportion of the thousands of employment discrimination cases filed each year in federal court.

The decision of the court of appeals below is a classic example of the practice of appellate courts of making a do novo determination of whether a particular pattern of sexually harassing conduct brought about a hostile or abusive work environment. "*We find*, based on a consideration of all of the circumstances, that Moore's conduct did not render Shepherd's work environment objectively 'hostile' or 'abusive.'" (App. 6a)(Emphasis added). "*We find* each comment made by Moore to be the equivalent of a mere utterance of an epithet that engender[s] offensive feelings." (App. 5a-6a)(Emphasis added). "Moore's comments were not as frequent or as serious as comments that *we have found* to alter the work environment."

(App. 7a)(Emphasis added)[5]. "*We find* . . . that Moore's stares and the incidents in which he touched Shepherd's arm . . . were not severe."(App. 6a)(Emphasis added).

Such appellate determinations are inconsistent with the decisions of this Court. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), clearly contemplated that the trier of fact would ordinarily resolve hostile environment claims. "[T]he trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'" 477 U.S. at 68-69. In a concurring opinion in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), Justice Scalia expressed the view that the weighing of the factors spelled out by the majority in that case would be entirely within the province of a properly instructed jury.

> As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages. . . . Be that as it may, I know of no alternative to the course the Court today has taken.

510 U.S. at 24.[6] In *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998), the Court observed that

> [c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the

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[5]"The touching of Shepherd's shoulder is not the type of severe conduct that *courts have found* to create a hostile environment." (App. 7a)(Emphasis added).

[6]A number of lower court decisions which hold that this issue should be left to juries rely on this passage from Justice Scalia's opinion. *E.g. Hathaway v. Runyon*, 132 F. 3d 1214, 1221 (8th Cir. 1997).

> plaintiff's position would find severely hostile or abusive.

118 S.Ct. at 1002. The opinion did not explain, however, in what instances courts rather than juries should be making that determination.

This Court's recent decision in *Davis v. Monroe County Board of Education*, 1999 WL 320808 (May 24, 1999), raised but did not resolve the similar problem that would arise in a Title IX claim against a school board based on sexual harassment of one student by another. Four members of the Court, in a dissenting opinion, insisted that the liability standard articulated by the majority would invariably be applied by juries[7]. The majority, on the other hand, clearly envisioned that there would be some cases in which summary judgment could be awarded in favor of a defendant[8].

The larger issue underlying this problem is the appropriate roles of judges and juries in resolving mixed questions of law and fact. In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court expressly declined to address "the much-mooted issue" of the proper treatment of such mixed questions, 456 U.S. at 289 n. 19, noting that even the distinction between questions of law and questions of fact posed "vexing" problems. 456 U.S. at 288. Most recently in *City of Monterey v. Del Monte Dunes at Monterey*, 1999 WL 320798 (May 24, 1999), the Court held that the mixed question at issue in that case was properly left to the jury, because it was "essentially fact-bound [in] nature." 1999 WL 320798 at *23.

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[7]1999 WL 320808 at *29 ("The majority does not even purport to explain, however, what constitutes an actionable denial of 'equal access to education.' . . . It appears the majority is content to let juries decide"), *31 ("A reasonableness standard, regardless of the modifier, transforms every disciplinary decision into a jury question.")

[8]1999 WL 32808 at *13 ("In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response [to a harassment complaint] as not 'clearly unreasonable' as a matter of law.")

This decision, however, provides little guidance as to how such mixed questions should be dealt with in other contexts.

(b) As the Third Circuit has correctly observed, there is a clear division among the circuit courts as to whether the existence vel non of a hostile work environment is a an issue for the trier of fact or a question of law for de novo appellate determination.

> The parties disagree regarding the standard of appellate review that should be applied to the district court's conclusion [as to the existence of a hostile environment] . . . . [T]he courts of appeals are divided. . . . The Supreme Court "has long noted the difficulty of distinguishing between legal and factual issues." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-02 . . . (1990). *See also, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 288 . . . (1982).

Konstantopoulos v. Westvaco Corp., 112 F. 3d 710, 716 n. 1 (3d Cir. 1997).

Three circuits insist that a hostile environment claim raises a factual issue and that juries properly have the central role in its resolution. The leading Eighth Circuit decision, *Hathaway v. Runyon*, 132 F. 3d 1214 (8th Cir. 1997), holds that the lack of any mechanical rules in *Harris* dictates that a jury verdict will almost always be upheld--and, presumably, be necessary.

> Justice Scalia pointed out in his concurring opinion that since Congress set no clear standard defining a hostile environment, it must be left to "virtually unguided juries" to decide whether particular conduct is "egregious enough" to merit an award of damages. . . . There is no bright line between sexual harassment and merely unpleasant conduct so a jury's decision must generally stand unless there is trial error.[9]

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[9]132 F. 2d at 1221.

Other Eighth Circuit decisions rely on *Hathaway* in concluding that "whether the conduct rose to the level of abuse is largely in the hands of the jury"[10], at times stressing that the jury has such a preeminent role because of the "'fact-intensive' nature of the determination of whether a work environment is hostile."[11]

The Second Circuit in *Gallagher v. Delaney*, 139 F. 3d 338 (2d Cir. 1998), advanced a different reason for giving juries the central role in resolving sexual harassment cases, arguing that juries are in fact more competent than judges to adjudicate these controversies.

> A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations . . . . Today, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogenous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment . . . . Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications. . . . In this period of rapidly changing and conflicting views of

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[10]*Howard v. Burns Bros., Inc.*, 149 F. 3d 835, 840 (8th Cir. 1998); *Bailey v. Runyon*, 167 F. 3d 466, 469 (8th Cir. 1999)(*quoting Howard* and *Hathaway*); *Breeding v. Gallagher*, 164 F. 3d 1151, 1159 (8th Cir. 1999)(*quoting Howard*).

[11]*Bales v. Wal-Mart Stores, Inc.*, 143 F. 3d 1103, 1109 (8th Cir. 1998), *quoting Crist v. Focus Homes, Inc.*, 122 F. 3d 1107, 1111 (8th Cir. 1997).

> appropriate gender relationships in the workplace, decisions by a jury in debatable cases are sound in policy and consonant with the Seventh Amendment.[12]

A later Second Circuit decision relies on *Gallagher* to hold that summary judgment should be utilized only "sparingly" in sexual harassment cases.[13]

A series of Fourth Circuit decisions insists that whether "harassment is sufficiently severe or pervasive is quintessentially a question of fact." *Webb v. Baxter Healthcare Corp.*, 57 F. 3d 1067 (4th Cir. 1995)(table), 1995 WL 352485; *Beardsley v. Webb*, 30 F. 3d 524, 530 (4th Cir. 1994). The district court in *Webb v. Baxter Healthcare Corp.* had granted summary judgment for the defendant, explaining: "[W]hat we have got here is, I think, the classic, not so much hostile work environment, as perhaps obnoxious work environment. I don't think there is any question from this record that [the perpetrator] would not be a pleasant supervisor. He's got a true locker-room sense of humor. It was not in good taste." 1995 WL 352485 at *4-5. In reversing, the Fourth Circuit astutely commented, "This passage sounds more like a finding of fact than a ruling that a reasonable jury could make only one finding of fact." *Webb*, 1995 WL 352485 at *5.

On the other hand, three circuits hold that the determination of the existence vel non of a hostile environment is, at least ordinairily, the responsibility of judges rather than juries. The Ninth Circuit insists that this issue is purely an issue of law: "whether the conduct . . . was sufficiently severe and pervasive to constitute sexual harassment is a question of law reviewed de novo." *Fuller v. City of Oakland, Cal.*, 47 F. 3d 1522, 1527 (9th Cir. 1995)(reversing decision by trial judge in favor of defendant); *Smith v. Oakland Scavenger Co.*, 127 F. 3d 1106 (9th Cir. 1997)(table), 1997 WL 661335 *4 (*quoting*

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[12]139 F. 3d at 343.

[13]*Distasio v. Perkin Elmer Corp.*, 157 F. 3d 55, 61 (2d Cir. 1998).

Fuller). Thus appellate panels in the Ninth Circuit routinely make determinations of this issue. *E.g. Williams v. Goelitz Candy Co.*, 131 F. 3d 150 (9th Cir. 1997)(table), 1997 WL 735006 *2 ("*[W]e hold* that these incidents were not sufficiently offensive or pervasive to constitute a hostile work environment")(emphasis added).

The Sixth Circuit too holds that "[w]hether misconduct rises to the level of a hostile work environment is a legal question . . . ." *Stacy v. Shoney's, Inc.*, 142 F. 3d 436 (6th Cir. 1998)(table), 1998 WL 165139 *3. A later Sixth Circuit decision describes the leading decision in that circuit, *Black v. Zaring Homes, Inc.*[14], as having held "that the defendant's verbal conduct was not objectively hostile or abusive as a matter of law." *Abeita v. Transamerica Mailings, Inc.*, 159 F. 3d 246, 251 (6th Cir. 1998). The Sixth Circuit therefore routinely makes its own determinations as to whether the harassment to which a given plaintiff was subjected created a hostile environment. *Black v. Zaring Homes, Inc.*, 104 F. 3d 822, 827 (6th Cir. 1997)(sexual harassment claim dismissed based on "*our finding* that the record here does not establish an objectively hostile work environment")(emphasis added); *Harrison v. Metro Government of Nashville*, 80 F. 3d 1107, 1117 (6th Cir. 1996)(overturning finding of harassment following bench trial)("As reprehensible as the incidents of alleged harassment may have been, *we do not find* that they constituted an unreasonably abusive environment")(emphasis added); *Harrington v. Boysville of Michigan, Inc.*, 145 F. 3d 1331, 1998 WL 252755 *5 (6th Cir. (Mich.))("[T]he comments did not create a hostile work environment . . . .")

The Seventh Circuit decision in *Baskerville v. Culligan Intern. Co.*, 50 F. 3d 428, 430 (7th Cir. 1995), originally insisted that whether a given set of circumstances amount to a hostile environment is ordinarily a question for a judge, but indicated that there is a set of close cases in which a jury should

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[14]104 F. 3d 822 (6th Cir.), *cert. denied*, —U.S.—, 118 S.Ct. 172 (1997).

be asked to make the final decision[15]. In later Seventh Circuit decisions, however, even this limited jury role has disappeared. *E.g. McKenzie v. Illinois Dept. of Transp.*, 92 F. 3d 473, 480 (7th Cir. 1996)("*[W]e cannot hold* that the frequency or severity of the comments rose to the level of 'unreasonably interfer[ing]' with [plaintiff's] environment")(emphasis added); *Gleason v. Mesirow Financial, Inc.*, 118 F. 3d 1134, 1145 (7th cir 1997)("*we are not persuaded* that [the perpetrator's] alleged conduct, objectively speaking, rose to the level of actionable sexual harassment")(emphasis added); *Brill v. Lante Corp.*, 119 F. 3d 1266, 1275 (7th Cir. 1997)("the incidents described . . . were not sufficiently severe or pervasive to amount to sexual harassment *under the law of this circuit*")(emphasis added); *Cowan v. Prudential Ins. Co. of America*, 141 F. 3d 751, 757 (7th Cir. 1998)("Taking these incidents together, . . . , the atmosphere . . . was not severe enough or pervasive enough to create an objectively hostile work environment. *We reach this conclusion* by looking 'at all the circumstances . . .'")(emphasis added); *Ngeunjuntr v. Metropolitan Life Ins. Co.*, 146 F. 3d 464, 467 (7th Cir. 1998)(even on plaintiff's view of the facts "*we would have to conclude* that the evidence presented does not reveal an environment sufficiently hostile that a reasonable

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[15]The *Baskerville* approach is all the more unusual because under that decision the distinction which judges, not juries, are in the first instance to make is between a discriminatory environment which is only "unpleasant" and thus legal, and one which is "hostile" and therefore unlawful, hardly words with any legally established meaning. *See* 50 F. 3d at 431:

> "It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other; and when it is uncertain on which side the defendant's conduct lies, the jury's verdict, whether for or against the defendant, cannot be set aside in the absence of trial error. Our case is not within the area of uncertainty."

person would find it abusive")(emphasis added).

In the Third, Fifth and Tenth circuits, appellate opinions, like the decision in this case, simply make "findings" that no hostile work environment existed, without attempting to explain why the responsibility for making such determinations belongs to appellate judges rather than to juries. *Sprague v. Thorn Americas, Inc.*, 129 F. 3d 1355, 1366 (10th Cir. 1997)("Our review of the remarks alleged by [the plaintiff] *leads us to conclude* that these remarks . . . [did not] create an actionable hostile environment")(emphasis added); *Houck v. City of Prairie Village, Kansas*, 166 F. 3d 1221 (10th Cir. 1998)(table), 1998 WL 792154 * 3 ("*we hold* that the instances of which plaintiff complains were not sufficiently pervasive or severe to alter the conditions of plaintiff's employment"); *Howard v. Beech Aircraft Corp.*, 1995 WL 355252 *2 (10th Cir.)("*the court cannot find* that the plaintiff was subjected to a pervasively hostile environment"); *Konstantopoulos v. Westvaco Corp.*, 112 F. 3d 710, 716 (3d Cir. 1997)("*[W]e conclude*, based on our own examination of the record, that [the plaintiff] was not subject to a hostile or abusive working environment")(emphasis added); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F. 3d 591, 597 (5th Cir. 1995)(the incidents complained of "were not so frequent, pervasive or pointedly insulting . . . as to create an objectively hostile working environment")(overturning jury verdict).

The conflict among the lower courts regarding this impostant issue is manifest, and should be resolved by this Court.

II. THE DECISION OF THE COURT OF APPEALS THAT SEXUAL HARASSMENT IS NOT ACTIONABLE UNLESS IT IS BOTH "SEVERE *AND* PERVASIVE" CONFLICTS WITH DECISIONS OF THIS COURT AND OF NUMEROUS COURTS OF APPEALS

For thirteen years this Court has consistently held that a plaintiff seeking to establish the existence of a hostile

environment may rely either on proof that the harassment was pervasive, or on proof that it was severe. In five different decisions this Court has used the same disjunctive formula, requiring evidence that the harassment was sufficiently "severe *or* pervasive" to alter the conditions of employment and create a hostile environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)(emphasis added); *see Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998, 1003 (1998); *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257, 2265 (1998); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2283 (1998). A fundamental difference between the rule applied under Title VII and the far more stringent standard applicable to claims of student harassment under Title IX is that only the latter requires proof that the harassment was *both* severe and pervasive. *Davis v. Monroe County Board of Education*, 1999 WL 320808 at *3, 13, 14, 15 (May 24, 1999).

In the instant case the court of appeals, in the teeth of this Court's repeated instruction to the contrary, held that a Title VII sexual harassment claim required proof of both severity and pervasiveness. The appellate court acknowledged that the alleged conduct here had occurred "with some regularity" (App. 5a); the fatal defect in petitioner's claim, the Fifth Circuit insisted, was that none of these repeated acts of harassment were *also* severe.

> [T]he comments made by Moore were boorish and offensive. The comments, however, were not *severe*. In Adusumilli v. City of Chicago, the Seventh Circuit considered averments of conduct similar to Moore's . . . . The court noted that "the most salient feature of the harassment is its lack of *severity*" . . . . We find similarly that Moore's stares and the incidents in which he touched Shepherd's arm . . . were *not severe*. . . . "Title VII was only meant to bar conduct that is so *severe and* pervasive that it destroys a protected classmember's opportunity

> to succeed in the workplace." . . . The touching of Shepherd's shoulder is not the type of *severe* conduct that courts have found to create a hostile environment.

(App. 5a-7a)(Emphasis added). The Fifth Circuit departed two years ago from the disjunctive standard set by this Court. *Weller v. Citation Oil & Gas Corp.*, 84 F. 3d 191, 194 (5th Cir. 1996)(conduct must be "severe *and* pervasive")(emphasis added), *cert. denied*, 117 S.Ct. 682 (1997). The Sixth Circuit also requires that the harassment be both "severe and pervasive." *Barna v. City of Cleveland*, 1998 WL 939884 * 3.

The Fifth Circuit's rule is part of a larger problem which has divided the lower courts for several years. Those courts disagree about whether the judges should identify certain types of sexually harassing practices--particular categories of remarks or actions--which ought to be protected under Title VII as a matter of law because they are less severe in content than the practices condemned in *Meritor*. Four circuits, including the Fifth Circuit, have taken that approach. As the Seventh Circuit has candidly explained, these circuits recognize a "safe harbor for employers" for many non-severe discriminatory remarks and actions. *Gleason v. Mesirow Financial, Inc.*, 118 F. 3d 1134, 1144-45 (7th Cir 1997); *Galloway v. General Motors*, 78 F. 3d 1164, 1168 (7th Cir. 1996). Practices which do not reach the requisite "level of offensiveness"[16] fall within the safe harbor and cannot as a matter of law provide a basis for a Title VII claim, regardless of how often they occur, of whether the employer was well aware of and indifferent to them, or, presumably, of whether they are tolerated or even sponsored as a matter of official company policy.

The safe harbor doctrine insists that the law distinguishes between two categories of harassing practices. Most non-severe forms of harassment are deemed too mild to

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[16]*Gleason v. Mesirow Financial, Inc.*, 118 F. 3d at 1145; *see Galloway v. General Motors Service Parts Oper.*, 78 F. 3d 1164, 1168 (7th Cir. 1996).

give rise to a Title VII claim, and are labeled, or more accurately dismissed as, only "offensive"[17], "merely offensive"[18], "merely mildly offensive"[19], "vulgarity"[20], "merely vulgar"[21], "tasteless"[22], "distasteful"[23], "insensitive"[24], or "inappropriate"[25]. The second type of conduct, which can support a hostile environment claim, is

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[17]*Hartsell v. Duplex Products, Inc.*, 123 F. 3d 766, 773 (4th Cir. 1997).

[18] *Harrington v. Boysville of Michigan, Inc.*, 145 F. 3d 1331, 1998 WL 252755 *5 (6th Cir.(Mich.)); *Bermudez v. TRC Holdings Inc.*, 138 F. 3d 1176, 1181 (7th Cir. 1998); *Black v. Zaring Homes, Inc.*, 104 F. 3d 822, 826 (6th Cir. 1997); *Crawford v. Medina General Hosp.*, 96 F. 3d 830, 836 (6th Cir. 1996); *Walker v. Social Health Ass'n of Greater Cincinnati, Inc.*, 73 F. 3d 363 (6th Cir. 1995)(table), 1995 WL 758463 *1-*2; *Thomas v. Shoney's, Inc.*, 60 F. 3d 825 (4th Cir. 1995)(table), 1995 WL 391958 *2.

[19]*Baskerville*, 50 F. 3d at 431; *see Hartsell v. Duplex Products, Inc.*, 123 F. 3d 766, 772 (4th Cir. 1997)("mildly offensive" conduct "unactionable.")

[20]*Hopkins v. Baltimore Gas and Elec. Co.*, 77 F. 3d 745, 753 (4th Cir. 1996).

[21]*Cowan v. Prudential Ins. Co. of America*, 141 F. 3d 751, 759 (7th Cir. 1998); *Baskerville*, 50 F. 3d at 431; *Gleason*, 118 F. 3d at 1144; *Carr v. Allison Gas Turbine Div. Gen. Motors*, 32 F. 3d 1007, 1010 (7th Cir. 1994).

[22]*Hopkins v. Baltimore Gas and Elec. Co.*, 77 F. 3d 745, 754 (4th Cir. 1996).

[23]*Baskerville*, 50 F. 3d at 431.

[24]*Bermudez*, 138 F. 3d at 1181.

[25]*Black*, 104 F. 3d at 826.

repugnant"[27], "deeply disturbing"[28], "intimidating"[29], "physically threatening"[30], "humiliating"[31] or "degrading"[32]. On this view "offensive" has become in these circuits a technical term denoting conduct that Title VII was never intended to end and that women simply have to put up with. These circuits have developed a sort of caselaw-based rating system, under which a particular act of harassment is cognizable and capable of supporting a Title VII claim only if the practice is as severe as conduct in some prior successful claim.

The decision below is a classic example of this methodology. Moore's remarks about the color of petitioner's nipples and about her sexual relations with her fiance were rated too mild to support a harassment claim because the judges of the court of appeals did not think they were as bad as "comments about sexual proclivity" in an earlier case. (App. 7a). Repeated efforts to look down petitioner's dress or blouse, and regular unwanted stroking of petitioner's arm, the court reasoned, could not support a Title VII claim--no matter how often they occurred--because they were not as severe as actually grabbing a woman's breast. (App. 7a). Since on the Fifth Circuit's view none of these abuses were serious enough to support a hostile environment claim, Title VII would allow an employer to knowingly tolerate or even encourage the obnoxious conduct that occurred in this case.

Five other circuits have rejected this entire approach, holding instead that *any* discriminatory act of harassment--

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[27]*Baskerville*, 50 F. 3d at 431.

[28]*Baskerville*, 50 F. 3d at 431.

[29]*Carr*, 32 F. 3d at 1009 (7th Cir. 1994).

[30]*Crawford*, 96 F. 3d at 836.

[31]*Crawford*, 96 F. 3d at 836.

[32]*Carr*, 32 F. 3d at 1009.

severe or otherwise--can contribute to a hostile work environment. In the Third Circuit a cognizable incident of sexual harassment need only be "discrimination" and "detrimenta[l]"; "an employee can demonstrate that there is a sexually hostile work environment without proving blatant sexual misconduct."[33] In the Ninth Circuit the plaintiff is required to show simply that the incidents were "unwelcome" and "based on sex"[34]. The Eighth Circuit standard permits a plaintiff to build a hostile environment claim from any practices of "discrimination because of her sex by the intentional conduct of her fellow employees consisting of unwelcome sexually motivated conduct or other unwelcome conduct which was directed at [her] because she is female."[35] In the Federal Circuit "*any* harassment or other unequal treatment of an employee . . . that would not occur but for the sex of the employee . . . may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII."[36] The Second Circuit relied on *Harris* in rejecting any suggestion that "employers are free from liability in all but the

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[33]*Spain v. Gallegos*, 26 F. 3d 439, 447 (3d Cir. 1994); *see Knabe v. Boury Corp.*, 114 F. 3d 407, 410 (3d Cir. 1997); *Aman v. Cort Furniture Rental Corp.*, 85 F. 3d 1074, 1081 (3d Cir. 1996).

[34]*Mendoza v. Borden, Inc.*, 158 F. 3d 1171, 1175 (9th Cir. 1998).

[35]*Hathaway v. Runyon*, 132 F. 3d 1214, 1221 (8th Cir. 1997); *see Gillming v. Simmons Industries*, 91 F. 3d 1168, 1171 (8th Cir. 1996); *Quick v. Donaldson Co., Inc.*, 90 F. 3d 1372, 1379 (8th Cir. 1996)(evidence need only show that "treatment" of employee of one gender was "worse than the treatment" of the other gender).

[36]*King v. Hillen*, 21 F. 3d 1572, 1583 (Fed. Cir. 1994)(emphasis added); *see id.* at 1581 ("lack of severity" of particular incidents not dispositive).

most egregious cases."[37]

The underlying division among the lower courts about the safe harbor doctrine is reflected in a dispute about whether "offensive" conduct can form the basis of a Title VII hostile environment case. Many decisions in the Fourth, Sixth and Seventh circuits insist that "offensive" conduct is precisely what Title VII does *not* forbid[38]; decisions in the Second, Third, Tenth and Federal Circuits hold the opposite[39]. A similar dispute exists about whether "vulgar"[40] or "coarse"[41] remarks can ever provide a basis for a hostile environment claim.

These differences in standards predictably lead to differing views as to whether a particular type of practice can

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[37]*Torres v. Pisano*, 116 F. 3d 625, 631 (2d Cir. 1997). In *Gallagher v. Delaney*, 139 F. 3d 338, 347 (2d Cir. 1998), the court of appeals reiterated a pre-*Harris* decision which had "emphatically" rejected a defense argument that a harasser's "conduct, though not a paradigm of modern inter-gender workplace relations, was not pervasive enough to trigger relief, . . . and [that] federal law does not punish 'trivial behavior' consisting of only 'two kisses, three arm strokes,' several degrading epithets and other objectionable-but ultimately harmless--conduct." *Quoting Carrero v. New York City Hous. Auth.*, 890 F. 2d 569, 578 (2d Cir. 1989).

[38]*See* nn. 17-19, *supra*.

[39]*Davis v. U.S. Postal Service*, 142 F. 3d. 1334, 1341 (10th Cir. 1998); *Torres v. Pisano*, 116 F. 3d 625, 633 n. 7 (2d Cir. 1997)(*quoting Andres v. City of Philadelphia*, 895 F. 2d 1469, 1486 (3d Cir. 1990); *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F. 3d 777, 781 (10th Cir. 1995); *King v. Hillen*, 21 F. 3d 1572, 1583 (Fed. Cir. 1994).

[40]*Compare* cases cited, nn. 20 and 21, *supra*, *with Morrison v. Carleton Woolen Mills, Inc.*, 108 F. 3d 429, 439 (1st Cir. 1997); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F. 3d 591, 595 (5th Cir. 1995).

[41]*Compare Baskerville*, 50 F. 3d at 430 *with Reed v. A.W. Lawrence & Co., Inc.*, 95 F. 3d 1170, 1179 (2d Cir. 1996).

support a sexual harassment claim. Thus in the Seventh Circuit it is not sufficiently objectionable that a supervisor remarked that his office was "hot" once the plaintiff entered[42], while in the Eleventh Circuit a plaintiff can base a harassment claim, in part, on a supervisor's assertion that he got "fired up" when she entered his office[43]. Disagreements exist about whether specific types of conduct or verbal abuse are covered by Title VII at all: insults[44], lewd gestures[45], staring or ogling[46],

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[42]*Baskerville*, 50 F. 3d at 430.

[43]*Mendoza v. Borden, Inc.*, 158 F. 3d 1171, 1175 (11th Cir. 1998).

[44]*Compare Crawford v. Medina General Hosp.*, 96 F. 3d 830, 833 (6th Cir. 1996)(references to the part of the office with older workers as "the dumb side" or "the worthless side" insufficient to support a finding of age harassment) and *Gleason v. Mesirow Financial, Inc.*, 118 F. 3d 1134, 1144-45 (7th Cir. 1997)(repeated references to female customers of brokerage as "dumb" merely "inappropriate") *with Morrison v. Carleton Woolen Mills, Inc.*, 108 F. 3d 429, 434 (1st Cir. 1997)(allegedly gender based statement to plaintiff that she was "dumb" would support a sex harassment claim; claim also supported by statement to plaintiff that "her place was in the kitchen"); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F. 3d 658, 571 (8th Cir. 1997)(repeated references by perpetrator to plaintiff as "damn dummy" and "idiot" will support harassment claim.") The harassment claim in *Harris* itself relied significantly on non-sexual insults. 510 U.S. at 19.

[45]*Compare Baskerville*, 50 F. 3d at 430 (gesture indicating masturbation insufficient to support sexual harassment claim) *with Davis v. U.S. Postal Service*, 142 F. 3d 1334, 1337 (10th Cir. 1998)(evidence that perpetrator made a "sexually obscene" gesture at plaintiff supported sexual harassment claim.)

[46]*Compare Penry v. Federal Home Loan Bank of Topeka*, 155 F. 3d 1257, 1260-63 (10th Cir. 1998)(despite having made explicitly sexual remarks, actions of perpetrators in repeatedly staring at plaintiff and "repeatedly tr[ying] to look down her blouse" dismissed as "gender-neutral antics") and *Gleason v. Mesirow Financial, Inc.*, 118 F. 3d 1134, 1144-45 (7th Cir. 1997)("ogling" dismissed as merely "inappropriate")

guttural noises[47], following the plaintiff[48], use of the word "bitch"[49], kicking[50], and expressing anger in sexist

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with King v. Hillen, 21 F. 3d 1572, 1574 (Fed. Cir. 1994)(sexual harassment claim supported by evidence that perpetrator "looked at [complainant's] body in a sexually suggestive manner").

[47]*Compare Baskerville v. Culligan Intern. Co.*, 50 F. 3d 428, 430 (7th Cir. 1995)("a grunting sound that sounded like 'um um um'" deemed insufficiently offensive to support a sexual harassment claim) *with Hathaway v. Runyon*, 132 F. 3d 1214, 1217 (8th Cir. 19997)(evidence supporting sexual harassment claim included "guttural noises . . . a purring or growling noise made in the throat").

[48]*Compare Penry v. Federal Home Loan Bank of Topeka*, 155 F. 3d 1257, 1263 (10th Cir. 1998)(despite other explicitly sexual remarks, act of perpetrator in "following [plaintiff] constantly when she got up to go the breakroom or the bathroom" dismissed as "gender-neutral antics") *with Mendoza v. Borden, Inc.*, 158 F. 3d 1171, 1175 (11th Cir. 1998)(perpetrator's action in following plaintiff sufficient to support sexual harassment claim).

[49]*Compare Galloway v. General Motors Service Parts Oper.*, 78 F 3d 1164, 1168 (7th Cir. 1996)(incessant use of epithet "sick bitch" not sufficient to support sexual harassment claim) and *Gleason v. Mesirow Financial, Inc.*, 118 F. 3d 1134, 1145 (7th Cir. 1997)(reference to female customers as "bitchy" merely "inappropriate") *with Morrison v. Carleton Woolen Mills, Inc.*, 108 F. 3d 429 434 (1st Cir. 1997)(use of term "bitch" does support sexual harassment claim), *Kimzey v. Wal-Mart Stores, Inc.*, 107 F. 3d 568, 571 (8th Cir. 1997)(same), and *Phelps v. Sears Roebuck and Co.*, 13 F. 3d 406 (10th Cir. 1993)(table), 1993 WL 523202 * 3 (same).

[50]*Compare Hartsell v. Duplex Products, Inc.*, 123 F. 3d 766, 769-73 (4th Cir. 1997)(kicking and shoving plaintiff's chair too trivial to support harassment claim) *with Kimzey v. Wal-Mart Stores, Inc.*, 107 F. 3d 568, 571 (8th Cir. 1997)(evidence that harasser kicked legs of female employee and shook ladder on which plaintiff was standing would support harassment claim).

language[51].

The requirement of severity and the broader safe harbor doctrine are inconsistent with the decisions of this Court. *Harris* and *Meritor* held that actionable harassment include "ridicule" and "insult"[52], abuses which today clearly would not be actionable at all in the Fourth, Fifth, Sixth or Seventh Circuits. The plaintiff in *Harris* had not alleged the occurrence of any sexual propositions or unwelcome physical contact; the jokes and innuendos of the harasser in *Harris* were certainly less extreme than the facts of the instant case. Yet this Court had no doubt that it was appropriate in *Harris* to direct the District Court in *Harris* to carefully assess whether the facts of that case met the standard announced in the Court's opinion, 510 U.S. at 23; on remand the district court in *Harris* found in favor of the plaintiff[53]. *Harris* admonished that the facts of *Meritor* could not be taken as "mark[ing] the boundary of what is actionable", but was merely an "especially egregious exampl[e]." 510 U.S. at 22. This explanation rejected precisely the sort of approach applied by the Fifth Circuit in the instant case.

More broadly, *Harris* made clear that the cognizable incidents from which a hostile environment case was to be constructed were any "discriminatory conduct." 510 U.S. at 23. *Meritor* had made the same point, explaining that "a plaintiff

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[51]*Compare Gross v. Burggraf Const. Co.*, 53 F. 3d 1531, 1542 (10th Cir. 1995)("sometimes don't you just want to smash a woman in the face" dismissed as merely reflecting "a supervisor's frustration at being unable to locate a female employee") *with Winsor v. Hinckley Dodge, Inc.*, 79 F. 3d 996, 1000 (10th Cir. 1996)(use of gender specific epithets to express anger constitutes actionable harassment even if underlying anger not gender based).

[52]*Harris*, 510 U.S. at 21; *Meritor*, 477 U.S. at 64; *id.* at 67 (epithets).

[53]*Harris v. Forklift Systems, Inc.*, 66 FEP Cas. 1186 (M.D.Tenn. 1964).

may establish a violation of Title VII by proving that *discrimination* based on sex has created a hostile or abusive work environment." 477 U.S. at 66 (emphasis added). *Harris* reiterated the passage in *Meritor* insisting that Title VII strikes at "the entire spectrum of disparate treatment of men and women", 510 U.S. at 17, not merely that part of the spectrum involving explicit sexual propositions or groping.

III. THE DECISION OF THE COURT OF APPEALS THAT SEXUAL HARASSMENT IS NOT ACTIONABLE UNLESS IT "DESTROYS A PROTECTED CLASSMEMBER'S OPPORTUNITY TO SUCCEED IN THE WORKPLACE" CONFLICTS WITH DECISIONS OF THIS COURT AND OF NUMEROUS COURTS OF APPEALS

The court of appeals also held that sexual harassment is actionable under Title VII only if it has a particular egregious impact on the victim.

> "Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace." . . . Moore's harassing actions, although offensive, are not the type of extreme conduct that would prevent Shepherd from succeeding in the workplace.

(App. 6a). There was no dispute that petitioner had found Moore's actions unwelcome, since she had repeatedly objected to him and complained to others. The complaint clearly alleged that the harassment had indeed caused grave harm; it asserted the pattern of abuse had led to a nervous breakdown and institutionalization. However, after being released from that institution and a six month medical leave of absence, petitioner had returned to her job, and continues to work for respondent. For the court of appeals, petitioner's resumed employment was sufficient to demonstrate conclusively that petitioner could still "succeed in the workplace", and thus her continued employment was without more fatal to her Title VII claim.

The Fifth Circuit has applied this extraordinary

requirement for several years. *Butler v. Ysleta Indep. Sch. Dist*, 161 F. 3d 263, 269 (5th Cir. 1998); *Weller v. Citation Oil & Gas Corp.*, 84 F. 3d 191, 194 (5th Cir. 1996); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F. 2d 591, 593 (5th Cir. 1995). In *Butler* the court held that a series of harassing letters, some sexual in nature, sent to a teacher by her principal, were not actionable because the content of the letters did not relate to the plaintiff's professional competence. In the court's view "a cartoon suggesting that women are incapable of teaching on account of their sex might undermine the ability of women to teach," 161 F. 3d at 270, but ordinary pornography, sexually explicit remarks or unwanted touching would not.

The Fourth[54] and Sixth[55] circuits apply a less extreme variant of this requirement, insisting that a sexual harassment plaintiff prove that the discrimination actually interfered with her job performance. The Sixth Circuit has repeatedly dismissed harassment claims on the ground that the harassment did not interfere with the plaintiff's actual job performance. *E.g. Zestos v. General Motors Corp.*, 113 F. 3d 1237 (6th Cir. 1997)(table), 1997 WL 219744 *1 ("Zestos's . . . claim fails because he did not show that the alleged harassment interfered

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[54] *Hopkins v. Baltimore Gas and Elec. Co.*, 77 F. 3d 745, 753-54 (4th Cir. 1996)(harassment must be "of the type that would interfere with a reasonable person's work performance . . . to the extent required by Title VII").

[55] *Fleenor v. Hewitt Soap Co.*, 81 F. 3d 48, 49 (6th. Cir. 1996); *Logan v. Royal Oak Township Public Safety Dept.*, 124 F. 3d 198 (6th Cir. 1997)(table), 1997 WL 589265 *1 ("To establish a hostile working environemtn claim, Logan must show that . . . the charged sexual harassment had the effect of unreasonably interfering with her work performance . . . "); *Peecook v. Northwestern National Insurance Group*, 156 F. 3d 1231 (6th Cir. 1998)(table), 1998 WL 476245 *2 ("In order to prove a prima facie case of hostile work environment, a plaintiff must show . . . the harassment had the effect of unreasonably interfering with the employee's work performance . . . .").

in any way with his work performance.")[56]

Decisions in the First, Seventh and Tenth circuits, on the other hand, have all rejected this requirement that harassment harm a plaintiff's job performance, correctly recognizing that such a rule would be palpably inconsistent with *Harris.*. *Davis v. U.S. Postal Service*, 142 F. 3d 1334, 1341 (10th Cir. 1998)("the law does not require a plaintiff to show that the discriminatorily abusive work environment . . . tangibly impaired her work performance")(*citing Harris*); *Scarfo v. Cabletron Systems, Inc.*, 54 F. 3d 931, 945-46 (1st Cir. 1995)("the trial court's instruction was incorrect in stating that

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[56]*Harrington v. Boysville of Michigan, Inc.*, 145 F. 3d 1331 (6th Cir. 1998) (table), 1998 WL 252755 *4 (6th Cir.(Mich.)(incidents of harassment had not "interrupted Harrington in her job performance. Thus, the comments did not create a hostile work environment within the meaning of Title VII"); *Barnes v. Montgomery County Board of Education*, 114 F. 3d 1186 (6th Cir. 1997) (table), 1997 WL 253279 *2 (6th Cir (Ky.))(perpetrator's actions "did not unreasonably interfere with Barnes's work performance. . . . [U]sing an objective standard, the actions would not unreasonably interfere with the ability of an emloyee to perform her job. Consequently, Barnes fails to demonstrate an objectively abusive or hostile work environment"); *Stacy v. Shoney's, Inc.*, 142 F. 3d 436 (6th Cir. 1998)(table), 1998 WL 165139 *3 (perpetrator's "alleged comments were offensive, but not sufficiently . . . to unreasonably interefere with Plaintiff's work performance to constitute actionable work place harassment"); *Harrison v. Metro Government of Nashville*, 80 F. 3d 1107, 1118 (6th Cir. 1995)("Mr Harrison testified at the hearing that [his manager's] statements, including [his] use of a racial epithet, affected him such that he 'couldn't hardly think a lot during the day', and had 'sleepless and restless nights.' Mr. Harrison also testified that he was 'rather shocked" in response to a Ku Klux Klan hood incident at work and that it caused him 'a lot of stress.' Further, the district court observed that a physician who had diagnosed Mr. Harrison as having stress-related situational insomnia stated that Mr. Harrison worked 'under a great deal of stress with a manager who is trying to run him off of a job.' However, the plaintiff has failed to present evidence that this work performance was affected by the racial hostility . . . .We conclude that the finding of harassment was therefore clearly erroneous.")

'unreasonabl[e] interfere[nce] with her work performance' was an absolute requirement for showing the existence of a hostile or abusive work environment")(*citing Harris*); *Dey v. Colt Const. & Development Co.*, 28 F. 3d 1446, 1455 (7th Cir. 1994)("a plaintiff . . . need not show that a campaign of harassment interfered with her work performance in order to establish a violation of Title VII")(*citing Harris.*)

In *Harris* itself the very argument advanced by counsel for the employer was that a sexual harassment plaintiff *must* prove that the harassment interfered with her job performance.[57] The majority clearly rejected such a requirement, instead indicating only that the presence or absence of such interference would be relevant evidence:

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. . . . *[N]o single factor is required.*

510 U.S. at 23 (Emphasis added). Justice Scalia observed that "the test is *not* whether work has been impaired, but whether working conditions have been discriminatorily altered." 510 U.S. at 25 (Emphasis added). Indeed, the continuing insistence of several circuits that harassment is not illegal unless it interferes with job performance--an interference which would presumably cause economic injury--is only a variant of the argument long ago rejected in *Meritor* that a plaintiff must

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[57]Brief for Respondent, No. 92-1168, pp. 27-28 ("In hostile environment cases it is especially important to demonstrate that conduct interferes with work performance. Requiring a plaintiff to show a nexus between conduct and ability to perform the job is particularly appropriate in cases such as this one . . . . [H]ostile environment plaintiffs bear the burden of demonstrating some nexus between offensive conduct and their ability to perform their jobs.").

prove "tangible loss" of an "economic character".[58]

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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[58] 477 U.S. at 64.

APPENDIX

Debra Jean SHEPHERD, Plaintiff-Appellant,
v.
The COMPTROLLER OF PUBLIC ACCOUNTS OF the STATE of TEXAS, Defendant-Appellee.

No. 98-20171.

United States Court of Appeals,
Fifth Circuit.

March 16, 1999.

Peter D. Costea, Houston, TX, for Plaintiff-Appellant.

Jonathan Brian Morgan, Michael Winget-Hernandez, Austin, TX, for Defendant- Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, SMITH and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Debra Jean Shepherd ("Shepherd") brought this action against her employer, the Comptroller of Public Accounts of the State of Texas ("Comptroller"), alleging a sexually hostile working environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Shepherd appeals the district court's grant of the Comptroller's Motion for Summary Judgment. We affirm.

I

Shepherd is employed by the Comptroller as a Tax Payer Service Person. Shepherd met co-worker Jodie Moore when he transferred into her office from a different agency.

Shepherd became engaged to Moore's brother-in-law, Darrell Gilmore, and Shepherd claimed in her deposition that Moore began to sexually harass her thereafter. According to Shepherd's deposition, on one occasion Moore stood in front of Shepherd's desk and remarked "your elbows are the same color as your nipples." Shepherd testified that Moore remarked once "you have big thighs" while he simulated looking under her dress. Shepherd claimed Moore stood over her desk on several occasions and attempted to look down her clothing. According to Shepherd, Moore touched her arm on several occasions, rubbing one of his hands from her shoulder down to her wrist while standing beside her. Shepherd alleged additionally that on two occasions, when Shepherd looked for a seat after coming in late to an office meeting, Moore patted his lap and remarked "here's your seat." Shepherd testified that Moore never propositioned her, asked her out on a date, or suggested that he would like to sleep with her. The touching stopped when Moore was reassigned to a different agency. Shepherd affirmed that, apart from the above instances, she engaged in friendly discussions with Moore on almost a daily basis and had a friendly relation with him at work and outside of work.

The conduct about which Shepherd complains allegedly took place for almost two years. The Comptroller had a sexual harassment policy in place that urged employees to report sexual harassment to their supervisors or to the Employee Assistance Liaison. After a year, Shepherd complained to her supervisor that Moore harassed her, although she did not mention the sexual nature of the harassment. Shepherd raised complaints about the sexual nature of the harassment immediately after receiving an unfavorable evaluation of her work product, and she blamed Moore for her poor performance. The Comptroller performed an investigation, and Moore denied the conduct. The investigation led to the transfer of Moore to a different location. Shepherd continues to work for the Comptroller.

Shepherd filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that

discrimination based on sex created a hostile work environment in violation of Title VII. The EEOC issued Shepherd a right-to-sue letter, and Shepherd filed suit in state court. After the Comptroller removed to federal district court, the Comptroller moved for summary judgment, arguing that the facts did not rise to the level of actionable hostile work environment, and alternatively, that the Comptroller took prompt, effective remedial action once it learned of Shepherd's allegations. The district court entered a final judgment against Shepherd from which she has timely appealed.

II

Title VII makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e-2(a)(1). "[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986). There are five elements necessary to set forth a hostile environment claim: (1) that the employee belongs to a protected class; (2) that the employee was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment affected a "term, condition, or privilege" of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt remedial action. See Jones v. Flagship Int'l, 793 F.2d 714, 719-20 (5th Cir.1986); see also Sharp v. City of Houston, 164 F.3d 923, 929 (5th Cir.1999) (stating that the fifth element remains undisturbed).

Shepherd contends that the district court erred in granting summary judgment. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). In its motion for summary judgment, the Comptroller argued that there is no genuine issue of material fact regarding two elements of Shepherd's claim. The Comptroller argued that the harassment did not affect a "term, condition, or privilege" of employment, and that it took prompt, effective remedial action once it learned of Shepherd's allegations. On appeal, Shepherd challenges each of the arguments advanced by the Comptroller in favor of summary judgment.[1] We review a district court's grant of summary judgment de novo, applying the same standard as the district court. See Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 312 (5th Cir.1995).

We turn to whether Shepherd has raised a genuine issue that Moore's harassment affected a "term, condition, or privilege" of her employment. The Supreme Court explained in Meritor that, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " 477 U.S. at 67, 106 S.Ct. at 2403 (citation omitted). Not all harassment will affect a term, condition, or privilege of employment. See id. The " 'mere utterance of an ... epithet which engenders offensive feelings in a employee' does not sufficiently affect the conditions of employment."

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[1]We may affirm a grant of summary judgment on any ground raised to the district court and upon which both parties had the opportunity to present evidence. See Brown v. CSC Logic, Inc., 82 F.3d 651, 653-54 (5th Cir.1996). We are uncertain of the district court's reasons for the judgment against Shepherd because the district court did not issue an opinion. Although district court judges are not required to specify a reason for a grant of summary judgment, we urge them to do so in order to allow the parties to focus their arguments on appeal. See Erco Indus. Ltd. v. Seaboard Coast Line R.R. Co., 644 F.2d 424, 434 (5th Cir.1981) ("the parties are entitled to know the reasons upon which the summary judgment was based in order to facilitate appellate review").

Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (quoting Meritor, 477 U.S. at 67, 106 S.Ct. at 2405). "A recurring point in [Supreme Court] opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' " Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2283, 141 L.Ed.2d 662 (1998) (citation omitted). Whether an environment is "hostile" or "abusive" is determined by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. See Harris, 510 U.S. at 23, 114 S.Ct. at 371. To be actionable, the challenged conduct must be both objectively offensive, meaning that a reasonable person would find it hostile and abusive, and subjectively offensive, meaning that the victim perceived it to be so. See id. at 21-22, 114 S.Ct. at 370.

Whether Moore's comments and actions rendered Shepherd's working environment objectively "hostile" or "abusive" must be considered in light of the totality of the circumstances. Shepherd alleges that Moore's harassing actions spanned a period of time over a year. Even if the conduct occurred with some regularity over this time period, we must also consider the other factors that contribute to whether an environment is hostile. We agree with Shepherd that the comments made by Moore were boorish and offensive. The comments, however, were not severe. We find each comment made by Moore to be the equivalent of a mere utterance of an epithet that engender offensive feelings. See id. at 21, 114 S.Ct. at 370. In Adusumilli v. City of Chicago, the Seventh Circuit considered averments of conduct similar to Moore's, including several incidents that involved staring and unwanted touching between the elbow and shoulder. See Adusumilli, 164 F.3d 353, 357 (7th Cir.1998). The court noted that "the most salient feature of the harassment is its lack of severity." Id. at

361. The court concluded that the conduct was too tepid to amount to actionable harassment. See id. at 362. We find similarly that Moore's stares and the incidents in which he touched Shepherd's arm, although they occurred intermittently for a period of time, were not severe. None of Moore's actions physically threatened Shepherd. Nor would Moore's conduct interfere unreasonably with a reasonable person's work performance. Furthermore, Moore's actions did not undermine Shepherd's workplace competence. See Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 269 (5th Cir.1998) (considering, in addition to the other factors, that "[a] plaintiff ... must show that implicit or explicit in the sexual content is the message that the plaintiff is incompetent because of her sex").

"Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace." Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 194 (5th Cir.1996), cert. denied, --- U.S. ----, 117 S.Ct. 682, 136 L.Ed.2d 607 (1997). Moore's harassing actions, although offensive, are not the type of extreme conduct that would prevent Shepherd from succeeding in the workplace. See Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2284, 141 L.Ed.2d 662 (1998) ("We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment."). We find, based on a consideration of all of the circumstances, that Moore's conduct did not render Shepherd's work environment objectively "hostile" or "abusive."

Shepherd's claim involves far less objectionable circumstances than those for which courts afford relief. Moore's comments were not as frequent or as serious as comments that we have found to alter the work environment. See Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 806 (5th Cir.1996) (finding that frequent egregious comments about sexual proclivity created hostile environment); cf. Long v. Eastfield College, 88 F.3d 300, 309 (5th Cir.1996) (finding single joke involving condoms insufficient to create hostile

environment). The touching of Shepherd's shoulder is not the type of severe conduct that courts have found to create a hostile environment. See, e.g., Waltman v. International Paper Co., 875 F.2d 468, 478 (5th Cir.1989) (concluding hostile environment existed where female employee sexually groped repeatedly); Hall v. Gus Const. Co., 842 F.2d 1010, 1012 (8th Cir.1988) (finding hostile environment where male coworkers cornered women and rubbed their thighs, grabbed their breasts, and held a woman so that a man could touch her). There is no evidence of an atmosphere of sexual inequality at the Comptroller's office. See DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596 (5th Cir.1995) (considering this factor when comparing cases). The Comptroller has a sexual harassment policy in place and educates new employees about the policy. Furthermore, Shepherd does not allege that supervisors or co-workers other than Moore engaged in the harassment. See id. (same). The comparison to other cases bolsters our conclusion that, based on the totality of the circumstances, Shepherd has not demonstrated a genuine issue that the harassment created a "hostile" or "abusive" working environment.

Viewing the harassment in light of existing caselaw, we hold that Shepherd has not raised a genuine issue that the harassment affected a "term, condition, or privilege" of employment. Thus, we do not reach the question of whether the Comptroller knew or should have known of the harassment and failed to take prompt remedial action. We AFFIRM the grant of summary judgment by the district court.

United States District Court
Southern District of Texas

DEBRA JEAN SHEPHERD,
Plaintiff,

versus

THE COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS,
Defendant.

Civil Action H-97-465

FINAL JUDGMENT

Debra Jean Shepherd takes nothing from the Comptroller of Public Accounts of the State of Texas.

Signed January 27, 1998, at Houston, Texas.

/S/

Lynn N. Hughes
United States District Judge

Supreme Court, U.S.
FILED
SEP 27 1999
OFFICE OF THE CLERK

(2)

No. 98-1989

In the
Supreme Court of the United States

DEBRA JEAN SHEPHERD,
Petitioner,

v.

THE COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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No. 98-1989

In the Supreme Court of the United States

DEBRA JEAN SHEPHERD,
Petitioner,

v.

THE COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Comptroller of the State of Texas, submits this brief in opposition to Debra Jean Shepherd's petition for writ of certiorari. In her petition, Shepherd asks the Court to review the decision of the Fifth Circuit Court of Appeals, affirming the district court's grant of the Comptroller's motion for summary judgment. *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871 (CA5 1999), *petition for cert. filed*, 67 U.S.L.W. 3773 (U.S. June 11, 1999) (No. 98-1989). Specifically, Shepherd attacks the lower court's holding that "Moore's conduct did not render Shepherd's work environment objectively 'hostile' or 'abusive.'" *Shepherd*, 168 F.3d at 874; Pet. at 6.

SUMMARY OF THE ARGUMENT

Shepherd's lawsuit alleges a violation of 42 U.S.C. §2000e-2(a)(1). Shepherd proceeded on a hostile work environment theory. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986). In her petition, Shepherd contends that this Court's jurisprudence establishes that factual determinations regarding sexual harassment claims are entirely and exclusively within the province of a jury. Pet. at 7. Further, Shepherd contends that the Fifth Circuit's application of this Court's "severe or pervasive" standard is in conflict with other courts of appeals, as well as with this Court. Pet. at 15. The Court should deny Shepherd's petition because the court of appeals's decision does not conflict with relevant decisions of this Court or decisions of the United States courts of appeals. *See* SUP. CT. R. 10(b), (c).

This case does not merit review because the courts of appeals agree on the relevant governing legal principles. Indeed, the Fifth Circuit followed this Court's clearly established precedent in deciding this case. Moreover, Shepherd's attempt to fabricate a conflict in the circuits fails. Every case relied upon to support the alleged split follows the legal standards adopted by this Court regarding sexual harassment claims. Accordingly, certiorari should be denied.

Moreover, the court of appeals properly determined that Shepherd's allegations of sexual harassment were insufficient to defeat summary judgment under this Court's jurisprudence. To the extent that Shepherd argues that

summary judgment was improperly granted because only a jury may assess whether the facts as alleged constitute sexual harassment, her argument is without merit. Summary judgment is appropriate in a Title VII case when the nonmovant has failed to make a showing sufficient to establish the existence of an element essential to her case on which she bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Second, Shepherd did not establish that the conduct subjectively and objectively altered the conditions of her work environment. *Harris*, 510 U.S. at 22-23. For these reasons, the Fifth Circuit properly affirmed the district court's grant of summary judgment in the Comptroller's favor.

Further, the issues in this case involve only the application of established constitutional principles to the facts. The petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction. Accordingly, because there is no conflict between the court of appeals's decision and the relevant decisions of this Court concerning whether a Title VII violation occurred as an initial matter, Shepherd's petition should be denied.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT SUMMARY JUDGMENT WAS APPROPRIATE IN THIS HOSTILE WORK ENVIRONMENT CASE.

Shepherd asks the Court to delineate the role of a jury in a hostile work environment suit. Pet. at 6. Shepherd contends that in *Meritor*, this Court indicated that juries should have the primary role in deciding such cases.

Id. Moreover, Shepherd contends the courts of appeals are split over whether judges or juries should determine whether a hostile work environment existed. Pet. at 9. Additionally, Shepherd argues that appellate courts are making factual determinations of whether the work environment was abusive or harassing. Pet. at 6.

Shepherd seems to argue that hostile work environment cases should not be decided on motion for summary judgment. To the extent that Shepherd's question is broader than the question raised below, the issue is not properly before the Court. Indeed, Shepherd argued on appeal that the district court erred in granting the Comptroller's motion for summary judgment. *Shepherd*, 168 F.3d at 873. The Fifth Circuit responded:

> [s]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'"

Shepherd, 168 F.3d at 873 (citing FED. R. CIV. P. 56(c); *Celotex*, 477 U.S. at 327). The Fifth Circuit's reasoning is sound. Rule 56(c) of the Federal Rules of Civil Procedure was drafted as an effective tool for screening cases that do not merit a trial. FED. R. CIV. P. 56(c) advisory committee's note (1937 Adoption).

In 1986, the Court decided a trilogy of cases that redefined the standards that govern motions for summary judgment and encouraged its use to dispose of appropriate

cases. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex*, *supra*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Together, these cases conclusively establish summary judgment as a viable tool for eliminating meritless claims prior to trial, and they support the district court's grant of summary judgment in this hostile work environment case.

This Court's jurisprudence establishes that summary judgment should be granted in appropriate cases. In fact, the Court has explicitly stated:

> One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Celotex, 477 U.S. at 323-24. Notably, the Court has not excluded hostile work environment cases from summary judgment review, and it should not. There is no legal reason to treat hostile work environment cases differently from other civil lawsuits. Judge Edith Hollan Jones recently commented:

> What constitutes an actionable claim for a sexual hostile working environment is a fact-sensitive determination, but the Supreme Court's decisions strongly suggest that such allegations are *not* invariably to be resolved by the jury. . . . Motions for judgment as a matter of law can police the baseline for hostile environment claims.

Indest v. Freeman Decorating, Inc., 164 F.3d 258, 264 n.8 (CA5 1999).[1] Judge Jones's analysis is legally sound.

Shepherd argues that the Court has indicated that the trier of fact ordinarily would resolve hostile environment claims. Pet. at 7-8 citing *Meritor* and *Oncale v. Sundowner Offshore Serv., Inc.*, 118 S.Ct. 998 (1998). But contrary to Shepherd's assertions, the Court has never intimated that summary judgment is inappropriate in Title VII cases. In fact, two of the Court's leading cases regarding hostile work environment claims were appeals from summary judgments. *Oncale*, 118 S.Ct. at 1001; *Burlington Indus., Inc., v. Ellerth*, 118 S.Ct. 2257 (1998).

In *Meritor*, the Court reviewed a Title VII claim that was decided after an 11-day bench trial, accordingly the judge was the trier of fact.[2] 477 U.S. at 60. Because the case went to trial, the Court acknowledged that its review of the fact finder's credibility determinations was limited. 477 U.S. at 68. The Court certainly did not hold that summary judgment was inappropriate in a hostile work environment case because the issue was not even before it.

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1. Judge Jones wrote the opinion in which Justices Weiner and Furgeson concurred in judgment only, with Judge Weiner writing a separate concurring opinion.

2. In presenting her argument, Shepherd seems to use the term "trier of fact" to mean exclusively a jury. "Trier of fact" is more properly defined as either a jury or "the court when the court is trying an issue of fact other than one relating to the admissibility of evidence." BLACK'S LAW DICTIONARY 1047 (6th ed. 1991).

Also, Shepherd's reliance on *Oncale* to support her argument that the Court has observed that juries should resolve the issues in hostile work environment suits is unavailing. Pet. at 7-8. Again, the issue of whether summary judgment is inappropriate in these cases was not before the Court in *Oncale*. *Oncale* was based on the district court's grant of summary judgment based on its decision that Title VII did not authorize a cause of action for same-sex harassment. 118 S.Ct. at 1001. On appeal, the Fifth Circuit affirmed. The Court reversed the lower court's decision and held that same-sex discrimination may be prohibited by Title VII. *Id.* at 1001-02. Neither *Meritor* nor *Oncale* even suggests that summary judgment is inappropriate in hostile work environment cases.

The district court has the power to make the initial determination whether a plaintiff has produced sufficient evidence to defeat summary judgment. *Celotex*, 477 U.S. at 326; *Anderson*, 477 U.S. at 249. On appeal, the standard of review for a grant of summary judgment is *de novo*, and the appellate court will apply the same standards as the district court. *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (CA5 1995). Summary judgment must be affirmed unless the nonmoving party, who would bear the burden of proof at trial, can show a genuine issue of material fact as to each element of her claim. *Celotex*, 477 U.S. at 322-24; *Anderson*, 477 U.S. at 247-48. This rule allows summary judgment to eliminate frivolous claims and streamline employment discrimination litigation.

Shepherd attempts to expand the scope of the question presented to the Fifth Circuit (whether the district court properly granted summary judgment) into a different

inquiry (whether an appellate court should review mixed questions of law and fact *de novo*.).[3] Pet. at 8-9. This question regarding the appropriate standard of review is not before the Court. Because the proper standard of review in hostile work environment cases was not in dispute on appeal, the petition should be denied.

A review of the main cases Shepherd cites for the proposition that juries have the "central role" in resolving factual issues of sexual harassment cases belies her assertions of a circuit split. In *Hathaway v. Runyon*, 132 F.3d 1214, 1217 (CA8 1997), the Eighth Circuit reviewed whether a jury verdict was properly overturned. *Webb v. Baxter*, 57 F.3d 1067, 1995 WL 352485 (CA4 1995)(table), and *Stacy v. Shoney's, Inc.*, 142 F.3d 436, 1998 WL 165139 (CA6 1998)(table), are unpublished opinions and have no precedential value according to circuit rules. CTA4, Rule 36; CTA6, App. III, IOP 22. *Fuller v. Oakland, Cal.*, 47 F.3d 1522, 1525 (CA9 1995), is also a case involving a review of a bench trial, so whether summary judgment is appropriate in a hostile work environment case was not before the court. *Baskerville v. Culligan*, 50 F.3d 428 (CA7 1995), is also a review of a jury trial that does not contain any mention of the summary judgment question.

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3. The passage Shepherd cites from *Konstantopoulous v. Westvaco Corp.*, 112 F.3d 710, 716 n.1 (CA3 1997), *cert. denied*, 118 S.Ct. 1079 (1998), states there is circuit split on what the standard of review is for mixed questions of fact and law, not whether summary judgment is appropriate in hostile work environment cases. Pet. at 9.

Only *Gallagher v. Delaney*, 139 F.3d 338 (CA2 1998), involves a review of a motion for summary judgment in a hostile work environment case. The court of appeals explicitly disagreed with the district court's findings and conclusions, stating that "[t]he factual issues in this case cannot be effectively settled by a decision of an Article III judge on summary judgment." *Id.* at 342. Yet, the court's holding was that summary judgment was not appropriate because there was a genuine issue of material fact. *Id.* ("The evidence, viewed in the light most favorable to the appellant, requires a trial."). Although the Second Circuit expressed some concerns about use of summary judgment in hostile work environment cases, it did not hold that summary judgment is never appropriate in Title VII cases. In sum, the cases cited by Shepherd fail to demonstrate a circuit split on the issue of whether summary judgment is inappropriate in hostile work environment cases. Because there is not a split of authority, the petition should be denied.

II. THE COURT OF APPEALS PROPERLY EVALUATED WHETHER THE ALLEGED CONDUCT WAS "SEVERE OR PERVASIVE" TO ESTABLISH A CAUSE OF ACTION.

Shepherd argues that the Fifth Circuit deviated from this Court's "severe or pervasive" standard in evaluating whether the alleged conduct established a cause of action based on a hostile work environment theory. Pet. at 14-15. Specifically, Shepherd argues this Court formulated the test in the disjunctive—"severe or pervasive"—and the Fifth Circuit applied the test in the conjunctive—"severe and pervasive." Pet. at 15. Shepherd's argument is a straw

man because the Fifth Circuit followed this Court's precedent in reviewing this case. *Shepherd*, 168 F.3d at 874 ("The Supreme Court explained in *Meritor* that, "for sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'").

Shepherd's conclusory statement that the difference between Title VII's standard and Title IX's is that Title IX requires proof that the harassment be both severe and pervasive, citing *Davis v. Monroe County Bd. of Educ.*, 119 S.Ct. 1661 (1999), is puzzling considering that *Davis* draws from *Meritor*, *Harris*, and *Oncale* in stating the type of behavior that would establish a cause of action for student-on-student sexual harassment. *Id.* at 1675. Similarly, Shepherd's allegation that the Fifth Circuit departed from this Court's standards in *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191 (CA5 1996), is unfounded. In *Weller*, the Fifth Circuit reviewed whether the evidence was sufficient to sustain the jury's verdict of a hostile work environment. 84 F.3d at 194. The court of appeals recited the appropriate elements to establish a cause of action as stated by this Court in *Meritor* and *Harris*. *Id.* In fact, the Fifth Circuit has consistently reiterated this Court's standards in reviewing hostile work environment cases. *Indest*, 164 F.3d at 263-64; *Farpella-Crosby v. Horizon HealthCare*, 97 F.3d 803, 806 (CA5 1996); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (CA5 1995). The Fifth Circuit has correctly applied the law as established by this Court in Shepherd's case as well as other decisions.

Shepherd's contention that the "severe or pervasive" test is one that the Court intended to apply disjunctively is incorrect. While it is true that an extremely single severe act may establish a Title VII violation for hostile work environment, the converse is not supported by the Court's precedent. *Faragher v. Boca Raton*, 118 S.Ct. 2275, 2283 (1998) ("isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'"). For example, a professional football player who complained that other football players swatted his buttocks with wet towels while in the locker room and he found the behavior created a hostile work environment could probably show the behavior was pervasive, but without more, he would not have a cause of action. The Court has stated:

> A professional football player's working environment is not severely or pervasively abusive, . . . if the coach smacks him on the buttocks as he heads onto the field.

Oncale, 118 S.Ct. at 1003. Thus, simply pervasive conduct without any severity cannot serve the basis for a hostile work environment claim.

In contrast, a single severe act could establish a cause of action. For example, a supervisor and an employee are on a business trip. The supervisor forces the employee to have a sexual interlude and promises to reward the employee at work. This example borders on a criminal act depending on the facts and a single incident could establish a cause of action. *See Meritor*, 477 U.S. 59-60. Some courts have determined that the "required

showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." *Ellison v. Brady*, 924 F.2d 872, 878 (CA9 1991)(citing *King v. Board of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537 (CA7 1990); *Carrero v. New York Hous. Auth.*, 890 F.2d 569, 578 (CA2 1989)). This legal analysis finds support in the Court's jurisprudence.

The Court first established a cause of action for hostile work environment under Title VII in *Meritor*.[4] 477 U.S. at 66. *Meritor* established that to state a claim of hostile work environment under Title VII, the alleged conduct "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." 477 U.S. at 67. *Meritor* is instructive because the Court explained that not all harassment affects a "term, condition or privilege" of employment within the meaning of Title VII. The Court recognized that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" is not, by itself, actionable under Title VII. 477 U.S. at 67.

Seven years later, the Court revisited the hostile work environment issue in *Harris*. In *Harris*, the Court redefined conduct that is sufficiently "severe or pervasive" to establish a cause of action. The Court held that conduct that will support a cause of action begins in the middle of

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4. Interestingly in deciding *Meritor* the Court looked to and drew from a Fifth Circuit opinion—*Rogers v. E.E.O.C.*, 454 F.2d 234 (CA5 1971). *See* 477 U.S. at 65-67.

the range with "merely offensive" at one end and conduct that causes a "tangible psychological injury" at the other end. *Harris*, 510 U.S. at 21. The Court explicitly stated "[t]his is not, and by its nature cannot be, a mathematically precise test." *Id.* at 22.

Instead, the Court fashioned a totality of the circumstances test for courts to use in evaluating the severity of the conduct and its pervasiveness. The test includes: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23. The Court stated that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at *all* the circumstances." *Id.* This statement severely undercuts Shephard's argument that a the Court meant for a finding of pervasiveness, alone, to establish a cause of action. Pet. at 14-15. Notably, the Court avoided establishing a bright line rule, but this is precisely the remedy Shepherd seeks from the Court. Pet. at 16.

Shepherd attempts to broaden the issue for review by arguing that the courts are in complete disagreement over the level of severity of conduct that is actionable under Title VII ranging from merely offensive to more egregious conduct. Pet. at 16-23. Shepherd's attempt to coax the Court into reviewing this broader issue must fail. Shepherd has not shown the existence of a clear circuit split on the issue.

Shepherd complains that the circuits are divided

over the type of conduct that supports a cause of action. Shepherd states that some circuits are disposing of cases as a matter of law because the alleged conduct is "less severe in content than the practices condemned in *Meritor*." Pet. at 16. Shepherd argues that these circuits have created a "safe harbor for employers." Pet. at 16. Shepherd's argument proves too much. The Court has explicitly stated:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII purview.

Harris, 510 U.S. at 21. The test created in *Harris* is susceptible to varying determinations of whether the allegations are sufficient to prove a hostile work environment existed.

In Shepherd's case, the Fifth Circuit applied the law as established by this Court. Shepherd contends that the Fifth Circuit's decision is erroneous because it found the alleged conduct was "pervasive," and she claims this finding alone is sufficient to establish a cause of action. Pet. at 15. Again, the record shows that the Fifth Circuit followed this Court's holding in *Harris* and stated:

> Even if the conduct occurred with some regularity over this time period we must also consider the other factors that contribute to whether an environment is hostile.

Shepherd, 168 F.3d at 874. The record shows that the Fifth

Circuit assumed for the sake of argument that Shepherd could prove a pattern of conduct but recognized that pervasiveness, alone, is insufficient to establish a cause of action. Moreover, the Fifth Circuit noted that the alleged conduct must be considered in light of the totality of the circumstances test fashioned by this Court in *Harris*. *Shepherd*, 168 F.3d at 874. The record explicitly contradicts Shepherd's arguments that the alleged conduct falls within Title VII protections.

Simply put, the severity of Moore's conduct was not sufficiently egregious to constitute a hostile work environment claim. The Fifth Circuit correctly labeled the comments made by Moore as "boorish and offensive." *Shepherd*, 168 F.3d at 874. Necessarily, the Fifth Circuit held "based on a consideration of all the circumstances, that Moore's conduct did not render Shepherd's work environment objectively 'hostile' or 'abusive.'" *Id.*

There can be no doubt that the court below applied the standard set out in *Meritor*, *Harris*, and *Faragher* in deciding the constitutional issues before it, and the only real point of contention is the adequacy of the court's findings that the alleged conduct was merely "boorish" and "offensive." The purely factual nature of Shepherd's argument dictates that the petition for writ of certiorari should be denied.

III. THE COURT OF APPEALS PROPERLY FOUND THAT MOORE'S CONDUCT DID NOT CREATE A HOSTILE WORK ENVIRONMENT.

Shepherd argues that court of appeals erred in deciding that "Moore's harassing actions, although

offensive, are not the type of extreme conduct that would prevent Shepherd from succeeding in the workplace." Pet. at 24. Contrary to Shepherd's assertions, the court of appeals correctly applied the governing legal principles.

The applicable provision of Title VII, on which Shepherd bases her claim, states:

> It shall be unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.

42 U.S.C. §2000e-2(a)(1). To establish a claim for sexual harassment under this statute, the plaintiff must prove that (1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to affect a "term, condition, or privilege" of employment; and (4) that the employer either knew or should have know of the harassment and failed to take prompt remedial action. *Harris*, 510 U.S. at 21-22; *Burlington Indus., Inc., v. Ellerth*, 118 S.Ct. 2257, 2270 (1998); *Long v. Eastfield College*, 88 F.3d 300, 309 (CA5 1996).

In *Harris*, the Court explicitly stated that not all offensive conduct is within Title VII's purview. 510 U.S. at 21. Logically, to establish a claim of hostile work environment, there must be actionable conduct that causes interference with the plaintiff's working conditions. Thus, there is a necessary relationship between the alleged conduct and the changed work conditions. In *Faragher*,

the Court stated this standard for establishing a hostile environment claim:

> We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the courts of appeals have heeded this view.

118 S.Ct. at 2284. The Fifth Circuit followed *Faragher* in deciding that "Moore's conduct did not render Shepherd's work environment objectively 'hostile' or 'abusive.'" *Shepherd*, 168 F.3d at 874.

In sum, there is simply insufficient evidence to support a finding that Shepherd's workplace was "permeated" with discriminatory conduct, such that the terms and conditions of her employment were altered. *Harris*, 510 U.S. at 21. Accordingly, the court of appeals correctly held that Moore's conduct did not render Shepherd's workplace objectively hostile or abusive. *Shepherd*, 168 F.3d at 874. For these reasons, the Court should deny the writ of certiorari.

CONCLUSION

For the reasons stated, Respondent respectfully requests that Shepherd's petition for writ of certiorari be denied.

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No. 98-1989

In The

SUPREME COURT OF THE UNITED STATES

DEBRA JEAN SHEPHERD,
Petitioner,

v.

THE COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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(1) The petition delineates the conflict that currently exists among the lower courts as to whether the existence of a hostile work environment is a question of law, a question of fact, or a mixed question of law and fact. One recent article described in terms similar to the petition the division among the circuits about this issue:

> Most courts assert . . . that the question of whether a given working environment was "hostile" for Title VII purposes is one of fact. Indeed, a few go so far as to say the question is "quintessentially" factual. Other courts conclude that, because the existence of a hostile work environment can be determined only with reference to a "reasonableness

> standard", that the issue cannot be classified as a pure question of fact. Within this group, however, some courts hold that a deferential review is appropriate, while others freely substitute their judgment for that of the trial court. Finally, at least one circuit court has concluded that . . . the question of whether a work environment is hostile is one of law to be reviewed de novo. In sum, *confusion reigns*.

S. Schneindlin & J. Elofson, "Judges, Juries and Sexual Harassment", 17 Yale L. & Pol'y Rev. 813, --- (1999)(footnotes omitted)(emphasis added).

Respondent studiously avoids taking any position whatever as to which of these differing lines of cases is correct. Respondent is also careful to avoid stating whether on its view the court of appeals in the instant case treated petitioner's hostile environment claim as presenting a legal or a factual issue. As a consequence, the Brief in Opposition is largely unresponsive to the central issue raised by the petition.

Respondent does repeatedly describe the decision of the Fifth Circuit--correctly in our view--as having made its own determination that the environment to which petitioner was subjected was not hostile. "The court of appeals properly *found* that Moore's conduct did not create a hostile work environment." (R.Br.Opp. 16)(Emphasis added). "[T]he court of appeals correctly *held* that Moore's conduct did not render Shepherd's workplace objectively hostile or abusive." (R.Br.Opp. 17)(Emphasis added). Respondent insists that arguments as to whether a hostile environment was created are disputes of a "purely factual nature" (R.Br.Opp. 16), but offers no explanation as to how an appellate court would have the authority to make its own findings resolving such factual disputes.

Other circuits continue to insist that whether harassment created a hostile work environment is essentially factual in nature, and thus generally to be left to the trier of fact. E.g. *O'Shea v. Yellow Technology Services, Inc.*, --- F. 3d ---, 1999 WL 547959 *3 (10th Cir. 1999)("the severity and pervasiveness evaluation is particularly unsuited for summary judgment because it is 'quintessentially a question of fact'"); *Richardson v. New York State Department of Correctional Service*, ---F. 3d ---, 1999 WL 391551 *6 (2d Cir. 1999)(the existence of a hostile environment is "a 'mixed question of law and fact' . . . . Such mixed questions are 'especially well suited for jury determination . . . .'")(Citations omitted).

(2) Respondent describes the first question presented by the petition as whether summary judgment can *never* be granted in hostile work environment case. (R.Br.Opp. 9). That, however, simply is not the question at all.

Summary judgment, upon an appropriate showing, is permissible regardless of whether the underlying issue is one of law or fact or a mixed question. For example, the issue in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), was a straightforward question of historical fact--whether the decedent had been exposed to asbestos. Although the decision in *Celotex* approved the use of summary judgment in the absence of any significant evidence in support of the plaintiff's factual claim, *Celotex* has never been understood to authorize an appellate court to make its own findings of fact on such a question.

Courts divided about whether any given issue is legal or factual in nature would always nonetheless readily agree that there were at least some cases in which summary judgment could be awarded. But they would, as here, utilize palpably conflicting standards in determining whether summary judgment should or should not be granted.

(3) With regard to the other, related questions raised by the petition, respondent's position also remains obscure. The petition noted, for example, that the lower courts are divided as to whether a hostile environment claim requires proof that the harassment was "severe." (Petition 14-24). The Brief in Opposition at various points appears to take three different positions: (a) The harassment must be severe, and "severe" denotes a particular level of egregiousness that is determined as a matter of law. (R.Br.Opp. 11,15). (b) Severity, like pervasiveness, is just one of several factors to be considered in deciding whether an environment is hostile. (R.Br.Opp. 13). (c) There is no specific legally fixed minimum level of severity; rather, severity and pervasiveness are questions of degree, and the existence of a hostile environment depends on the interplay of the two factors. (R.Br.Opp. 12). The conflicting positions in respondent's own brief mirror the differences among the circuits.

(4) Respondent understandably does not defend the Fifth Circuit's holding that sexual harassment is lawful unless it "destroys a protected classmember's opportunity to succeed in the workplace" (App. 6a), and does not deny that that requirement conflicts with the decisions of this Court and of numerous circuit courts.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

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